d. The Constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves are as follows:

(i) The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

(ii) The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

(iii) The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(iv) § 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

e. Statement of the case:

A concise statement of the case containing the facts material to the consideration of the questions presented:

On August 11, 1973, Mrs. Paula Gail Bowman Hollar, left the home of her parents where she and her husband, Steven Hollar, were living. Her destination was Mac Dula Studios, however she did not arrive at work that day. Her car, a 1973 Pontiac Sprint, was found in its usual parking place on a lot located adjacent to Boundary Street in Lenoir, North Carolina. When her whereabouts could not be ascertained, her husband and several law enforcement officers began a search for her. Later that

that had been seized that day. She was asked to wait and some thirty minutes later, Captain Dewey Triplett of the Lenoir Police Department and Charles Whitman, Special Agent with the North Carolina State Bureau of Investigation arrived. They questioned the defendant's wife extensively in a small interrogation room until finally she accompanied them to the trailer where she and her husband lived where the officers took two rings which subsequently were shown to have been the engagement ring and wedding band of the victim.

At the trial, prior to selection of the jury, the district attorney testified at the request of the defendant that in the year 1973 in his three county district that 50 persons were indicted for capital offenses and that 5 were tried for the capital offense and that the remaining 45 were tried for lessor included offenses or plead guilty to lessor included offenses. He testified that the decision of whether to try a defendant for the capital offense or a lessor offense was his and his alone and that he had sole discretion to make such a determination. He further stated that due to a lack of staff he was unable to investigate the facts, stating "we are unable to screen all of our cases like the Federal Courts." At the close of the testimony of the district attorney, the defendant made a motion to quash the bill of indictment charging rape and charging first degree murder for the reason that the solicitorial discretion as was testified to by the district attorney was exercised in this case and that to allow the district attorney such discretion to determine whether a defendant shall be placed on trial for his life or for a lessor offense is in violation of the Eighth Amendment to the United States Constitution.

Defendant also made a written motion to quash the bills of indictment charging the crimes of rape, and first degree murder for the reason that the only permissable penalty under the present North Carolina law for the above offenses was the death penalty and that the death penalty constituted cruel and unusual punishment and therefore violated the Eighth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution.

Department and the defendant's sister testified for the defendant, the Court made findings of fact and conclusions of law permitting admission into evidence of the two rings, State's Exhibits 6 and 7. The defendant objected which objection was overruled and the defendant then noted an exception, being Exception No. 140 (Rp. 325).

With regard to the question presented for review Numbered (c)(iii) in which defendant alleges he was denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution for that the solicitor's discretion as exercised in this case violated the Eighth Amendment of the United States Constitution, this question was raised at the trial, prior to empanelling of any jurors. The defendant called the District Attorney, Donald E. Greene, to the witness stand and after questioning him with regard to his practice of exercising solicitorial discretion, the defendant moved to quash the bills of indictment charging rape and first degree murder which motions to quash were overruled to which defendant noted an exception. The motions were renewed at the close of trial in motions to set aside the verdict and in arrest of judgment. These motions were also overruled and the defendant noted exceptions.

With respect to question presented for review numbers (c)(iv), this question of equal protection was raised by a motion to quash the bills of indictment presented prior to selection of the jury. This motion was overruled at that time and the defendant noted an exception. This same motion was again reviewed at the close of the trial after entry of the jury verdict at which time the motion was again overruled and the defendant noted an exception.

With respect to question presented for review numbered (c)(v) in which the defendant alleges the trial court erred when it allowed the State, over defendant's objection to introduce at trial certain evidence which was

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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SUPREME COURT, U.S.

VERNON JUNIOR WOODS,	)	
	:	
Appellant	)	
	:	
v	)	
	:	PETITION FOR WRIT OF CERTIORARI
STATE OF NORTH CAROLINA	)	

****

Appellant respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the decision of the Supreme Court of North Carolina which found "no error" as to appellant's conviction of first degree murder and sentence to death. In support of said petition for writ of certiorari and in accord with Rule 23 of the Supreme Court Rules, appellant respectfully shows the following:

1. The opinion of the North Carolina Supreme Court is found in the official report of the case State of North Carolina v Vernon Junior Woods, 286 N. C. 612, 213 , S. E. 2d 214 (1975). A copy of the official report is appended.

2. The grounds on which the jurisdiction of this court is involved are as follows:

a. The appellant was convicted of first degree murder on January 28, 1974 in the Superior Court of Catawba County, North Carolina. Notice of appeal was given; however, given to delay in preparation of the transcript of the court reporter, the appeal was not perfected within the time allowed; appellant petitioned for a Writ of Certiorari which was allowed by the North Carolina Supreme Court on May 8, 1974. The opinion of the North Carolina Supreme Court was filed on April 14, 1975.

b. The statutory provision believed to confer on this court jurisdiction to review the decision of the North Carolina Supreme Court by Writ of Certiorari is 28 U. S. C. Section 1257 (3); The decision of the North Carolina Supreme Court is a decision by the highest court of the State of North Carolina in which a decision could be had, On the ground if its being repugnant to the United States Constitution (to wit, the Eighth Amendment and the Fourteenth Amendment); and further, that a title

right privilege or immunity especially set up or claimed under the Constitution, treatires or statutes of, or commission held, or authority exercised under the United States.

c. Questions presented for review are as follows:

(i) The trial court committed prejudicial error when it denied defendant's motions to quash bills of indictment charging the defendant with rape and murder, and in failing to grant defendant's motions in arrest of judgment for the reason that both the rape and murder charges carried as punishment a mandatory death penalty upon the conviction, and therefore, violate the Eighth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, for that the mandatory death penalty constitutes cruel and unusual punishment.

(ii) The trial court erred in denying defendant's motion to suppress certain evidence (to wit: State's Exhibits Nos. 6 and 7, an engagement ring and a wedding band), for that the defendant's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution were violated in that the evidence was seized by officers without the authorization of a valid search warrant, and said seizure did not fall within any of the exceptions which authorize a warrantless search and seizure.

(iii) The defendant was denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution for that a District Attorney in the State of North Carolina has the discretion to determine whether a defendant will be tried for a capital offense, such as first degree murder, or for a lesser included offense, such as second degree murder, and such discretion is unbridled, and subject to no lawful check or restraint. Testimony of the District Attorney in this case indicated that of approximately fifty defendants who were indicted for capital offenses in his jurisdiction in 1973, only five were tried for the capital offense, and the other defendants were allowed to plead non-capital offenses. Defendant contends that Furman v Georgia, 408 U. S. 38 ( ) should be extended to forbid a state to inflict the death penalty if either the judge, jury or solicitor as a matter of discretion can choose between the death penalty or a penalty or imprisonment.

(iv) Defendant was denined equal protection under the law for that the time defendant was tried in North Carolina, the only permissible punishment for murder or rape was death; however, in the majority of other states throughout the United States, the maximum constitutional punishment was life imprisonment.

(v) The trial court erred when it allowed the State over defendant's objections to introduce at trial certain evidence which was removed from defendant's automobile which had been unconstitutionally and illegally seized from defendant and his wife, said seizure taking place prior to issuance of a search warrant, prior to issuance of an arrest warrant, and prior to defendant's arrest, and without any consent to any such seizure being sought or given by defendant or his wife.

afternoon some clothing, papers and car keys which later were identified as having belonged to the victim were found by a young boy. After further searching, the body of the victim, Mrs. Hollar, was discovered in a small creek on Sunday. An intensive investigation was begun and numerous newspaper and radio requests were made for anyone having information about the incident to report it to the Lenoir Police Department. In subsequent days, several witnesses reported events to the Lenoir Police Department, including the witness James L. Cline who told the police that he was on his way to a local jewelry store on Saturday morning and he saw a young man and a young woman scuffling; that he didn't think too much about it at the time and did not report the incident to anyone until after he heard the reports of the discovery of Mrs. Hollar's body.

On the following Thursday, August 16, 1973, at 9:45 A.M. the defendant was met at his mother-in-law's home by members of the Lenoir Police Department. Defendant and his wife were in their automobile and the defendant was asked to accompany the officers to the police station

for questioning. This he did, leaving his wife and car at his mother-in-law's house. The vehicle the defendant was driving, a 1967 Black over Green Chevrolet, North Carolina License No. BMW-522, was also brought in by another police officer. No arrest warrants and no search warrants had been issued at the time and no consent was given to the taking of the automobile by either the defendant or his wife. The defendant was held at the Lenoir Police Department until arrest warrants were issued several hours later that morning charging the defendant with kidnapping, raping and murdering Paula Gail Bowman Hollar. At 1:45 P.M. the same day a search warrant was issued for the 1967 Chevrolet which had been in the possession of the police since the seizure of the vehicle that morning.

The defendant then had taken from him fingernail, hair, skin, saliva and other samples from his body. None of these samples revealed a positive match between samples taken from the body of the victim. At approximately 7:00 P.M. on Thursday, the defendant's wife came to visit the defendant at the Caldwell County Jail to bring him some food and to inquire about her pocketbook which had been in the Chevrolet automobile

The defendant made the further argument on Motion to Quash the two capital bills of indictment charging rape and first degree murder for the reason that they deny him equal protection of the law under the United States Constitution for the reason that in North Carolina the death penalty was the only permissable punishment on a conviction of rape or first degree murder. Several other states still retained the death penalty as permissable punishment, however the vast majority had done away with and abolished the death penalty. If the defendant had been in California or another state in which life imprisonment were the maximum penalty or if the crime had been committed in North Carolina prior to January 1973, when the North Carolina Supreme Court decided the case of State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973), then the punishment for his crime could have been life imprisonment.

The Court then denied each of the defendant's motions as to each bill of indictment to which the defendant made objection which objection

was overruled and defendant then noted his exception being Exception No. 2, Record Page 56. At the close of all evidence and after the verdict of the jury had been taken, the defendant moved to set aside the verdict in the kidnapping, rape and first degree murder cases for the same reason set forth previously in defendant's motion to quash bills of indictment as constituting cruel and unusual punishment and being in violation of the Eighth Amendment of the United States Constitution as interpreted by Furman v. Georgia, 408 U.S. 238 (1972).

f. With regard to the question presented for review Numbered (c) (ii) the question of whether the trial court committed error in denying defendant's motion to surpress certain evidence (to wit: State's Exhibits Nos. 6 and 7, an engagement ring and a wedding band), at the time the State sought to introduce the State's Exhibits Nos. 6 and 7, the defendant objected and moved for a voir dire to determine whether the State had lawfully obtained the two Exhibits Nos. 6 and 7. At the close of the voir dire during which time the defendant's mother-in-law, Nellie Faye Wilson, and the defendant's brother-in-law, Clarence Wilson, testified for the State and Captain Dewey Triplett of the Lenoir Police

removed from defendant's automobile which had been unconstitutionally and illegally seized from defendant and his wife, these questions were presented by objections made during the trial prior to the time each item of evidence was sought to be introduced. Each of these objections was overruled and defendant noted exceptions. These exceptions are numbered as follows with the page in the record at which the exceptions appear being listed in parentheses:

> Exceptions Nos. 209-210 (R p 342), 211-212 (R p 348), 225-228 (R p 361), 229-230 (R pp 361-362), 263 (R p 378), 284-286 (R p 394), 287 (R p 409), 288-291 (R pp 414-415), 292-295 (R p 416), 296-300 (R p 417), 301-305 (R pp 417-418) 306-307 (R p 419), 308 (R pp 419-420), 309-313 (R p 420), 314-317 (R pp 420-422), 318-319 (R p 422), 320-323 (R p 423), 324-325 (R p 424), 326-329 (R p 425), 330-333 (R pp 425-426), 334-336 (R p 427), 337-340 (R p 428), 341-345 (R p 429), 346 (R pp 429-430), 347 (R p 430), 360-362 (R p 451), 363-364 (R pp 451-452), 365-367 (R p 453), 368-372 (R p 454), 373-376 (R p 455), 377-380 (R p 456), 381 (R p 457).

All of the questions presented for review were passed on by the North Carolina Supreme Court and each assignment of error was found

to be without merit. Attached in the Appendix is the official report of the North Carolina Supreme Court in the case State of North Carolina vs Vernon Junior Woods, 286 N.C. 612, 213 S.E. 2d 214 (1975).

g. Argument amplifying the reasons relied on for allowance of the Writ:

(i) This Petition for Writ of Certiorari alleges as one of the grounds for allowance of the Writ, A ground which is very similar if not identical to that raised in the Petition for Writ of Certiorari filed by Jesse Fowler which Petition for Writ of Certiorari was granted by the United States Supreme Court, See Jesse Fowler vs State of North Carolina, U.S. (1975). The petitioner herein, Vernon Junior Woods, was tried for kidnapping, rape and murder after decision by the North Carolina Supreme Court of the case State of North Carolina vs. Waddell, 282 N.C. 431, 194 S.E. 2d (1973). That case was decided on January 19, 1973 and held that all first degree murder, rape, burglary, and first degree arson cases occurring after date of the decision would carry a mandatory death penalty. This case came as a result of the case of Furman v. Georgia, 408 U.S. 238 (1972) in which the United States Supreme Court determined that the death penalty was unconstitutional when it was imposed in the frame work provided by the courts of the State of Georgia which allowed a jury or a judge to determine whether a person convicted of first degree murder would suffer the death penalty or face life imprisonment. The Supreme Court also vacated death sentences in a case where a defendant had been sentenced to death by a jury which had the discretion to choose between death and prison confinement. See

this shows that discretion on the part of the District Attorney results in the vast majority of first degree cases being handled as less than capital cases, whether the defendants were tried for lesser charges or pled guilty to lesser charges. The District Attorney is given this power to select by the State, and that he exercises this power is documented by Mr. Greene's testimony.

In the instant case, the petitioner argues that the tainted element in Furman was Selectivity or discretion, and it mattered not just how the judge or jury made the selection. The problem was that the issue of life or death was too important to be left to this type of unfettered discretion by a judge or jury. Certainly if a judge, after hearing all the evidence in a capital trial, and after hearing pre-sentence reports from probation officers, and after hearing evidence and arguments from the State and from defense counsel on the issue of sentencing, is not competent to decide whether or not the death penalty or life imprisonment should be imposed, then the District Attorney, who makes his decision or selection prior to trial and has not heard such trial evidence, probation officer's reports, or arguments of counsel, is far less qualified than a judge or jury to decide the issue of life or death. In fact, the District Attorney is the advocate for the State and is therefore less impartial than a judge or jury in making his decision.

Since District Attorneys appear less qualified than judges to make such life or death decisions, and since Furman has decreed that it is violative of the Eighth Amendment to the U.S. Constitution to allow judges or juries to make such decisions, it follows of necessity that the Eighth Amendment

they were looking for (i.e. two rings); the police officers knew that the defendant's wife knew that her husband was in custody charged with serious offenses; the officers knew that the defendant's wife had not been able to see the defendant since he had been arrested earlier that morning although she had been attempting to see him all day long; the officers knew that the defendant's wife was concerned over the defendant's situation. In light of this the officers began questioning the defendant's wife in a small interrogation room and almost immediately the defendant's wife became visibly upset, both emotionally and physically. Under these facts and circumstances no wife could knowingly and voluntarily consent to any search of any manner. It was only after intensive questioning by two police officers followed by intensive crying by defendant's wife that she accompanied the officers and her mother to the trailer where she and her husband, the defendant, lived together as man and wife.

Upon arriving at the trailer the defendant's wife turned over the two rings to the police officers and these rings were subsequently shown to have belonged to the victim. However, an unlawful search does not become lawful by the discoveries which result from it. See Mapp v. Ohio, 367 U.S. 643 (196). If the investigating officers felt they had probable cause to search the trailer of the defendant and his wife, they had more than ample opportunity to procure a search warrant.

The State has not shown and did not show that the consent of the defendant's wife was voluntary, and the burden of proving voluntariness by clear and convincing evidence is on the State. See Schneckloth vs. Bustamonte, 412 U.S. 218 (1973).

time and the defendant consented to go to the police department with the officers for questioning. It was at that time that Officer Harless of the Lenoir Police Department took the keys to the defendant's automobile and drove it to the Lenoir Police Department following Detective Bean and the defendant. No consent to the taking of this vehicle was given by the defendant or his wife.

It is the contention of the Petitioner that the seizure of the vehicle was not incident to a lawful arrest in that it occurred several hours prior to the defendant being arrested. A search warrant was obtained later that afternoon and the vehicle was searched pursuant to that search warrant, however it is the contention of the petitioner that to allow the police to seize a vehicle without a search warrant and not incident to an arrest and then impound that vehicle until a search warrant is issued violates the terms of the United States Constitution, specifically the Fourth Amendment. This would mean that the police would be authorized in seizing any items from a person's car or home after the person had been taken to the police department for questioning and if the questioning resulted in the police issuing arrest warrants then all that the police would need to do is to bring a citizen in for questioning, then search his car, person or house and then arrest that person based on information obtained during the questioning or during the search of the car, person or house. Obviously this is in conflict with Mapp vs. Ohio, 367 U.S. 43 (1961).

h. There is appended to the petition a copy of the opinion of the North Carolina Supreme Court. State of North Carolina vs. Vernon Junior Woods, 286 N.C. 612, 213 S.E. 2d 214 (1975).

Respectfully submitted this 11th day of July, 1975.

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Jackson v. Alabama, 408 U.S. 938 (1972); Morales v. Texas, 408 U.S. 938 (1972); where the death penalty was mandatory unless the jury recommended mercy, Johnson v. Florida, 408 U.S. 939 (1972); Eaton v. Ohio, 408 U.S. 935 (1972); where the sentence was life unless the jury recommended death, Canaday v. Washington, 408 U.S. 940 (1972); where the defendant was sentenced to death by a judge following a plea of guilty, Alvarez v. Nebraska, 408 U.S. 937 (1972); Fesmire v. Oklahoma, 408 U.S. 935 (1972); where the defendant waived jury trial and was tried and sentenced by a judge, Delgado v. Connecticut, 408 U.S. 940 (1972); Miller v. Maryland, 408 U.S. 934 (1972); where the jury could make a binding recommendation of death, but where a recommendation of mercy could be overridden by a judge, Seeney v. Delaware, 408 U.S. 939 (1972); Kelback v. Utah, 408 U.S. 935 (1972); and where

the jury could make a binding recommendation of mercy, but where a recommendation of death could be overridden by a judge, Hurst v. Illinois, 408 U.S. 935 (1972); Strong v. Maryland, 408 U.S. 939 (1972). In none of these cases did the Court feel it necessary to examine the specific form of effect of the sentencing system which it declared invalid.

Apparently, the constitutionally invalid element in these cases was that Discretion that a judge or a jury could exercise in deciding whether a defendant would receive a prison sentence of the death penalty.

In the instant case, this petitioner urges the Court to consider that a form of discretion or selectivity still exists. The District Attorney in this case testified that in 1973, in his three-county district (Caldwell, Catawba and Burke), he had at least fifty (50) defendants indicted for first degree crimes. However, only about five (5) defendants were tried for capital cases in 1973. Certainly

is violated when the District Attorney makes a similar decision. That he does make and has made numerous such decisions is amply documented in the testimony of Donald Greene.

The element of discretion has not been removed from the system of justice. In one further respect, that is, a person convicted to a capital offense and receiving a mandatory death sentence has one further avenue of appeal, that being to the Governor of North Carolina. The Governor has the discretion to commute death sentences to life imprisonment and to commute life imprisonment terms to a term of years so that the defendant would be eligible for parole after serving a portion of that term of years. In this way the Governor exercises the same type of discretion that a judge or jury exercised in Furman v. Georgia and the related

cases thereunder. The Governor has the opportunity to decide the very crucial question of life or death and usually this decision is made on the basis of the information submitted to the Governor. What this means is that the defendant is indigent or who has no political ties whatever is at a distinct disadvantage and is decidedly discriminated against. This also holds true for members of minority races.

(ii) In further support of defendant's question (c)(ii), the petitioner states the following:

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The guarantee contained in the Fourth Amendment, protecting the people against unreasonable searches and

seizures, is implicat in the concept of due process contained in and made applicable to the States by the Fourteenth Amendment. Ker v. State of California, 83 S Ct 1623, 374 U.S. 23, 10 L Ed 2d 726 (1963).

The protection guaranteed by the Fourth Amendment is implemented primarily by the "exclusionary rule", the rule that evidence that has been illegally seized cannot be admitted in evidence. Terry vs. State of Ohio 88 S Ct 1868, 392 U.S. 1, 20 L Ed 889 (1968). This rule is also applicable to the States. Mapp vs. State of Ohio, 81 S Ct 1684, 367 U.S. 643, 6 L Ed 2d 1081 (1961). This "exclusionary rule" is statutory in North Carolina which is General Statute 15-27.1 and provides:

"No facts discovered or evidence obtained by reason of issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under

conditions requiring a search warrant, shall be competent as evidence in the trial of any action."

In the case before us, no search warrant was obtained and no effort was made to obtain a search warrant even though a Magistrate's office was directly across the street from the jail where the defendant was being held and also where the interrogation of the defendant's wife was conducted. There was no testimony that the officers even attempted to contact a magistrate, or in any manner prepare a search warrant.

In the instant case the facts are as follows: The defendant's wife was confronted and surrounded by officers at the jail where her husband had been locked up on capital charges of kidnapping, rape and murder. The officers suggested to this young wife that if she did not turn over the rings, she would be involved in the matter as an accessory. In the instant case the defendant was in custody; the police officers knew this; the police officers knew what

For consent to be voluntary, it must be made of a persons own free will, without coercion, inducement by fear, threat of harm or prosecution, or promise of reward or leniency. The petitioner contends that the State has failed to show that such fear, intimidation and coercion were not present in the mind of the wife of the defendant and that having failed to make such a showing, the "consent" of the wife cannot be deemed voluntary under the the totality of all the circumstances. Schneckloth v. Bustamonte, supra.

In support of the question No. (c) (iv) the defendant contends that he was denied equal protection under the law as guaranteed by the Fourteenth Amendment of the United States Constitution. Constitutional law is applied differently to this defendant by reason of fact alleged offenses occurred on August 11, 1973, rather than prior to State Vs.

Waddell, 282 N.C. 431, 194 SE 2d 19 (January 19, 1973). Defendant was tried under the same statutory law as persons tried for capital crimes prior to January 19, 1973. "According to the dissenting opinion of Mr. Justice Powell in Furman vs. Georgia, supra, 408 U.S. at p 417, 92 S.Ct 2726, 33 L Ed 2d 346, approximately six hundred individuals were in state and federal prisons, throughout the country, under sentence of death at the time Furman was decided. Many others, including six in North Carolina (one under two death sentences) had their death sentences reduced to life imprisonment just a short time earlier by virtue of the decisions of the Supreme Court of the United States vs. Jackson, 390 U.S. 570, 88 S.Ct 1209, 20 L.Ed 2d 138. (other cases cited).

Presently there are more than seventy persons who have received sentences of death in the State of North Carolina since January of 1973 when the Waddell decision was handed down.

Equal protection of the laws is something more than an

abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all - the least deserving as well as the most virtuous. Hill vs. Texas, 316 U.S. 400, 86 L Ed 1559.

The defendant is subject to capital punishment in North Carolina, but life imprisonment would be the maximum punishment in the majority of the states.

The North Carolina Supreme Court has interpreted Furman vs. Georgia as holding the provision in statutes providing for capital punishment as unconstitutional in that such confers on juries to send one defendant to death and another to life imprisonment for the same crime committed under substantially similar circumstances. State vs. Waddell,

supra. As set forth in the dissenting opinion of Waddell the highest courts of many states have construed Furman to abolish the death penalty under statutes similar to statutory law of North Carolina until such acts are amended by the legislative authority abolishing discretion.

(iii) In support of the question No. (c) (v), the petitioner makes the following argument: The Fourth Amendment as applied to the States by the Fourteenth Amendment guarantees certain rights to persons to be secure from unreasonable searches and seizures. In the instant case, as the defendant and his wife were driving their car, they were stopped by police officers who took the defendant to Police Headquarters, left the defendant's wife behind, and took their car to Headquarters also. The officers had no arrest warrant; they had no search warrant. The defendant was told by Detective Bean of the Lenoir Police Department that he would like for him to come with him to the Lenoir Police Department to talk with him. The defendant was not placed under arrest at that

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IN THE COURT OF [illegible] APPEALS [illegible] 1975

STATE OF NORTH CAROLINA

v. No. 22 - Cumberland

WILLIE JAMES POOLE

On certiorari to review the trial before Thornburg, J., at the 21 January 1974 session of Cumberland Superior Court. D[illegible] initially appealed, but the transcript was not available to prosecute the appeal within the time allowed. Defendant's petition for a writ of certiorari, which we allowed on 8 May 1974.

On indictments proper in form, defendant was convicted of kidnapping, rape and first degree murder, and received life imprisonment for kidnapping and the death penalty for both rape and first degree murder.

The evidence for the State tends to show: On Saturday 24 August 1974, shortly after 9:30 a.m., Mrs. Paula Gail [illegible] left the home of her parents where she and her infant daughter were living. Although due at work as a phlebotomist at Cumberland at 9:30 a.m., she did not arrive there. Her 1973 yellow Pontiac was found later that day in the parking lot where she usually parked it during working hours.

On the afternoon of 12 August, Charles D. Taylor of Lumber was visiting some of his property on Old Mill Creek Road [illegible] three quarters of a mile from Lumber River. [illegible] body partially submerged in a small area [illegible].

Dr. John Tulp, the Assistant Medical Examiner, performed [illegible] the next day. Dead [illegible] at that point having [illegible] 48 hours, in his opinion. [illegible] abrasions and bruises [illegible] arm, hand, knee, and [illegible]. [illegible] multiple penetrations of the [illegible] which, in his opinion, was a single [illegible] of large [illegible].

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intact spermatozoa were found in deceased's vagina. The cause of death was blunt trauma to the head.

Otis Miller, who operated a service station in Lenoir, talked to defendant for about five or ten minutes between 6:30 a.m. and 9:30 a.m. on 11 August regarding repairs to defendant's automobile. It appeared to Miller that defendant had been drinking and Miller saw a fifth-size bottle of liquor in the floorboard of defendant's automobile.

Mrs. Violet Price was parking at her place of employment in Lenoir at about 7:45 a.m. on 11 August when defendant pulled in beside her, got out, opened her door, and asked, "What's your name?" She answered, "Get away from my car." Defendant then said, "I'm sorry, I thought you were my wife," and drove away. Mrs. Price was eight and one-half months pregnant at the time.

Mrs. Agnes Ruppert was walking to the post office about 8:40 a.m. on 11 August when defendant, in a light-green Chevrolet with a dark vinyl top, pulled into the curb and began yelling to her and motioning to her to come to him. She recognized him since he had accompanied his wife on several occasions while his wife was being fitted for contact lenses at Mrs. Ruppert's place of employment. Mrs. Ruppert continued to the post office and defendant drove away.

Mrs. Shirley Watson was parking her automobile for a visit to the beauty shop around 7:30 a.m. to 7:45 a.m. on 11 August when defendant drove into the parking lot and began staring at her. He stared at her until she went into the beauty shop.

Mrs. A. F. Lupes was parked outside a house in Lenoir waiting for a girl who works for her mother at about 8:05 a.m. on 11 August when defendant stopped beside her and honked his horn. Mrs. Lupes thought defendant wanted to enter a driveway that she was blocking so she backed up. Defendant then pulled into a parking lot across the street and motioned for her to come to his automobile. Mrs. Lupes drove away and came to a stop at a red stoplight down the

street. Defendant, who had followed her, stopped his car, got out, and walked to the driver's side of Mrs. Hayes's vehicle. He told her to stop at a parking lot and to wait for him because he wanted to talk to her. When the light changed, she drove directly home and told her husband.

James L. Cline was walking in Lenoir on 11 August shortly before 9:00 a.m. As he emerged from an alley which served as a short cut to his destination, he saw the victim's Pontiac and defendant's 1967 light-green Chevrolet with a black vinyl top parked across the street in the lot where deceased's car was found. The automobiles were about twenty feet apart. He saw defendant with his arm around the neck of deceased. They were about three feet from the victim's Pontiac. Defendant took her to the Chevrolet, opened the door, and shoved her into the front seat. Cline did not see her head above the seat after that.

Judge A. P. Culp was walking to the post office about 8:50 a.m. on 11 August when he heard a short blast from the horn of an automobile parked in the lot where deceased's Pontiac was found. He saw the back of a young woman apparently being held down by someone. At the time he was about ten feet away. He did not see any faces. He remembered seeing only one car. He assumed they were two youngsters "carrying on," and did nothing to aid the girl at that time.

Paul Beagle was waiting at a red light in Lenoir shortly before 9:00 a.m. on 11 August and saw a man and woman sitting in a light-colored Pontiac at the parking lot in question. The man's arms were around the woman. It was the same Pontiac he had often seen parked there.

Mr. Maxie C. Watson was also waiting for the light near the parking lot to change "sometime before 9:00 a.m." on 11 August. He saw a man standing beside a light-colored automobile with his right arm around a girl's neck and his left hand over her face around her mouth.

Mrs. Louise H. Wilcox was driving on Hibriten Drive about 10:20 a.m. on 11 August. As she approached the intersection of Hibriten Drive and Old Mill Creek Road, a 1967 light-green Chevrolet approached her from the other direction in her lane of traffic. The car was occupied by two people. Mrs. Wilcox stopped completely and the Chevrolet turned down Old Mill Creek Road.

There was also testimony that defendant gave three rings to his wife sometime during the afternoon of 11 August. One was an engagement ring, another was a wedding band, and another was a 1972-1973 high school ring. Two of the rings were identified by the deceased's husband and the jeweler who sold them to him as belonging to deceased. Defendant told his wife that he had won the rings in a poker game the night before. The wedding and engagement rings were introduced into evidence at the trial. The high school ring was never recovered.

The State further offered expert testimony that tended to show that certain fibers found in defendant's 1967 Chevrolet automobile matched fibers from the dress worn by the victim on 11 August, and that a portion of an identification card found in the Chevrolet matched a larger portion of the identification card found in the victim's wallet in the creek where her clothing was found.

Defendant's evidence tended to show that defendant was at his sister's house south of Lenoir from 7:00 a.m. to 7:40 a.m. and again about 10:00 a.m. on 11 August 1973. That he stayed there for about fifteen minutes and seemed to be normal. His mother saw him that afternoon and he appeared normal.

Defendant did not testify.

Other facts pertinent to decision are set out in the opinion.

Attorney General [illegible] by Assistant Attorney General [illegible], for the State.

[illegible] for defendant appellant.

Jones, Jessie

Defendant first assigns as error the action of the trial court in allowing the State to challenge peremptorily without cause more than nine jurors. It was stipulated that the State peremptorily excused eleven jurors and the record shows that the defendant peremptorily excused thirteen. The trial court ruled that the State had twenty-two peremptory challenges and that the defendant had thirty-four.

Defendant was charged with two capital crimes and one noncapital.

G.S. 9-21 in part provides:

> "(a) In all capital cases each defendant may challenge peremptorily without cause 14 jurors and no more. In all other criminal cases each defendant may challenge peremptorily six jurors without cause and no more. . . .
>
> "(b) In all capital cases the State may challenge peremptorily without cause nine jurors for each defendant and no more. In all other criminal cases the State may challenge peremptorily without cause four jurors for each defendant and no more. . . ."

The trial judge allowed the State nine peremptory challenges in each capital case and four in the kidnapping case, for a total of twenty-two. Defendant was allowed fourteen in each capital case and six in the kidnapping case, for a total of thirty-four. This was error. Under the express provisions of the statute in all capital cases the defendant may challenge fourteen jurors and the State may challenge nine jurors "and no more." (Emphasis added.) See State v. Alridge, 206 N.C. 850, 175 S.E. 101 (1934). In the present case, however, we think this error is harmless.

It is well established that the system by which juries are selected does not include the right of any party to select certain jurors but to permit parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. Defendant has no vested rights to a particular juror. State v. Honeycutt, 285 N.C. 171, 203 S.E. 2d 814 (1974); State v. Atkinson, 275 N.C. 300, 167 S.E. 2d 241 (1969). The right of peremptory challenge is not a

right to select but to exclude. State v. Allred, 275 N.C. 554, 169 S.E. 2d 833 (1969); State v. Hannon, 149 N.C. 519, 63 S.E. 81 (1908). Defendant did not exhaust the fourteen peremptory challenges given him by the statute and was not in any respect denied his right to exclude prospective jurors unacceptable to him.

As was said by Chief Justice Stacy in State v. Hoskins, 227 N.C. 552, 555, 43 S.E. 2d 77, 80 (1947):

> ". . . To present an exception on rulings to challenges to the polls, the appellant is required to exhaust his peremptory challenges and then undertake to challenge another juror. Oldham v. R. R., 171 N.C., 303, 88 S.E., 433. The challenged action in the matter must be harmful and has effect unavoidable before it will be held to vitiate the trial. S. v. Cochran, 60 N.C., 404; S. v. Dunlap, 19 N.C., 196.
>
> "The trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury. The defendants would be entitled to no more on a new trial, and this they have already had. S. v. Jones, 187 N.C., 581, 122 S.E., 306; S. v. Griffin, 204 N.C., 569, 54 S.E., 841; S. v. English, 164 N.C., 497, 80 S.E., 72; S. v. [illegible], 172 N.C., 892, 90 S.E., 797. Their right is not to select but to reject jurors. Having been tried by twelve jurors who were unobjectionable to them, the defendants have no valid ground to urge that they have been prejudiced by the composition of the jury. S. v. Pritchett, 106 N.C., 667, 11 S.E., 537; S. v. [illegible], 94 N.C., 1021."

Although it was error for the trial court to allow the State more than nine peremptory challenges and to allow the defendant more than fourteen, we hold that this error was harmless and not so prejudicial as to require a new trial. See 3 Strong, N.C. Index 2d, Criminal Law § 167, p. 126, and cases cited therein.

This assignment is overruled.

Defendant next assigns as error the denial of his motion to suppress the evidence and receiving into evidence State's Exhibits Nos. 6 and 7, an engagement ring and a wedding band. He contends that his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were violated in that this evidence obtained by the officers was without

the authorization of a valid search warrant and that evidence obtained in such a manner is incompetent under G.S. 15-27, the federal exclusionary rule, and federal and state decisions dealing with non-consensual searches conducted without search warrants.

To support this position, defendant cites State v. Hall, 264 N.C. 539, 142 S.E. 2d 177 (1965). The facts in Hall were briefly as follows: Defendant was in jail and officers both from North Carolina and Virginia knew this. They did not request defendant's permission to search his home but went to the home, confronted defendant's wife, identified themselves as police officers, and asked for the privilege of searching the house. There was some question as to the extent the officers told the wife free to consent to the search, or whether the number of officers had a coercive effect sufficient to make her consent involuntary. A search of the house by the officers turned up a clock and a radio which were later identified as belonging to the store in Bolton, North Carolina, which had been robbed. The officers then confronted the defendant with those items, at which time he confessed to the breaking and entering and larceny. This Court held that the possession of the radio and clock was unlawfully obtained by the officers and were improperly admitted in evidence. The facts in the present case clearly distinguish it from Hall.

Here, there were but two officers who talked to Mrs. [illegible] the police station in the presence of her mother. Mrs. [illegible] was asked about the rings and was persuaded by her mother to give the rings to the officers. She thereafter took her mother and the officers to her dwelling house where she withdrew the door and led the two officers and her mother to her bedroom where she pulled up a board of her bedroom floor, reached down and took from the hole a pocket [illegible] and then the rings in question and gave them to the officers. [illegible] Mrs. [illegible] was with the officers less than five minutes. The

sions given to the officers by Mrs. Woods had been given to her by her husband on 11 August 1972. The signs were hers and were in her possession.

It is well settled that evidence obtained by unreasonable searches and seizures is inadmissible. Fourth, Fifth and Fourteenth Amendments to the United States Constitution; Article I, Section 20, of the North Carolina Constitution; G.S. 15-27 (repealed effective July 1, 1975, by Chapter 1200, Section 36, 1973 Session Laws); Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); State v. Reams, 277 N.C. 301, 178 S.E. 2d 65 (1970); State v. Colson, 274 N.C. 295, 163 S.E. 2d 376 (1968). It is also well settled that the constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant where no search is required. U. S. v. Pate, 324 F.2d 934 (7th Cir. 1963), cert. den. 377 U.S. 937, 12 L.Ed. 2d 299, 84 S.Ct. 1341 (1964); State v. Reams, supra, State v. Vinzil, 276 N.C. 217, 172 S.E. 2d 20 (1970).

Quoting with approval from State v. Coolidge, 109 N.H. 156, 293 A.2d 332, this Court in Reams, supra, at 309, 178 S.E. 2d at 69, stated:

> "A search evidentially justified is made by an officer of the law, a right also liberally placed for that which is contraband. A seizure contemplates forcible dispossession of the owner. Harris v. United States, 331 U.S. 145, 227, 91 S.Ct. 1098, [illegible] quoted on [illegible] v. Reid, 324 F.2d 934, 935 (7th Cir. 1963); [illegible] is omitted.]"

The evidence in this instant case amply supports the trial judge's findings of fact:

> "That Mrs. Woods had a legal right to order the officer off the premises when she did so with her consent and the officers. That the officers remained on said premises.
>
> "That the incriminating nature of evidence in question, that is, Woods was not known by the officers [illegible] the right and [illegible] to do so until discovered by her actions to constitute with the officers. That she was under no duress, restraint or coercion, at the time she agreed to go to the station."

These facts sustained the trial judge's conclusion of law that "there was no unreasonable search of the premises occupied by the defendant and his wife or the car that the keys were physically, and normal, that the keys were legally obtained from him. That the volunteered, voluntarily, understandingly and intelligently turned over their possession to the officers."

We hold, therefore, that no search was involved, [illegible] that the keys voluntarily turned the keys over to the officers. They were properly admitted into evidence.

This assignment of error is overruled.

Defendant next contends that his rights under the Fourth Amendment to the Constitution of the United States, as applied to the states by the Fourteenth Amendment, were violated by the unreasonable search and seizure of the automobile in question.

In the instant case, as defendant and his wife were driving their car they were accosted by police officers who took defendant to police headquarters for questioning. The officers had no arrest warrant and no search warrant.

While defendant was being taken to police headquarters, the 1957 Chevrolet and his wife were driven by an officer to headquarters also. Once there, the car was impounded and thereafter a search warrant for the car was issued and served on the defendant and on his wife before any search of it was made.

Defendant contends that the officers had no reasonable grounds for a warrantless arrest and, since he was not arrested when he was taken in for questioning, the seizure of the automobile at that time without a search warrant was unconstitutional and that all evidence gained from the car and all testimony which pertains to the evidence found in the car should have been suppressed.

It is not necessary to decide whether defendant was under arrest when he was requested by the officers to accompany them to the police station for questioning. The officers did not [illegible] believe that defendant had committed them

[illegible]—kidnapping, rape, and [illegible] was likely to [illegible] if not immediately taken into custody. An arrest at that time would have been proper. G.S. 15-41 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws).

While he was at the police station, defendant was formally arrested and proper warrants charging the crimes [illegible] were served on him. The car was impounded and was not searched until a search warrant was procured and served. Defendant contends, however, that the original seizure of the automobile was unreasonable and without a warrant and that any evidence obtained therefrom was inadmissible. Unreasonable searches and seizures are prohibited by both the Constitution of the United States and the Constitution of North Carolina, and all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in both state and federal courts. State v. Allen, 282 N.C. 503, 194 S.E. 2d 9 (1973); State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179 (1972); State v. Hill, 278 N.C. 365, 180 S.E. 2d 21 (1971); G.S. 15-27 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws).

A warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and if exigent circumstances make it impracticable to secure a search warrant. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed. 2d 685 (1969); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); State v. Allen, supra; State v. Ratliff, supra; State v. Jordan, 277 N.C. 341, 177 S.E. 2d 289 (1970).

In the instant case there was sufficient evidence to constitute probable cause that the 1967 Chevrolet driven by defendant and taken to the police station had been involved in the kidnapping, rape, and murder of the deceased. Later in the day, this evidence was sufficient to cause a magistrate to issue a

search warrant for the car. The officers who seized the automobile were faced with the dilemma. Plainly, if the automobile was not seized and impounded, the ends of the exclusionary rule might likely attempt to destroy or make unusable any evidence therein. This conclusion was based on evidence that she had already disposed of the victim's clean ring. The record was that unless the automobile was impounded and subsequently any evidence in the car could be seized and considered unavailable in the minds of the jury and probably even made inadmissible because of intervening unconsented access to the car by persons other than defendant. In Chambers v. Maroney, supra, at 51-52, 24 L.Ed. 2d at 429, 90 S.Ct. at 1981, Justice White, in upholding the search of a car, speaking for the United States Supreme Court, stated:

> "Arguably, because of the performance for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'limited' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion is depends on a variety of circumstances. For example, probably the most common arrangement, in this case, was to seize and hold the car before presenting the probable cause issue to a magistrate and obtaining a valid search warrant. On the other hand, only an immediate search was likely to be reasonable. Either course, then, would protect the privacy of the owner to substantially the same degree. Which is reasonable depends on a variety of circumstances. We should not, in this case, be required to select from among them in the first instance."

We held that the officers in this case had probable cause to seize and hold the car before presenting the probable cause issue to a magistrate and obtaining a valid search warrant.

This assignment is overruled.

By his assignment of error No. 12, defendant asserts that the trial court erred when it allowed the introduction of State's photographic Exhibits 1 through 5 because the photographs were not identified with reasonable certainty as being those of the deceased victim and of the car involved.

Defendant correctly contends that a photograph of a human, place or object may be introduced into evidence only when it

[illegible] by a witness. State v. Watson, 310 N.C. 390, 312 S.E. 2d 471 (1984); 2 Stansbury's N. C. Evidence, § 34, p. 97 (Brandis Rev. (1973)). The photographs of the parking lot on which the alleged robberies took place were made on 22 August 1977, which date was after the building had been completely remodeled by Veteran Henry N. Dula, co-owner of the premises, at the direction and under the supervision of the Hendersonville Police Department. Photographs of this scene included photographs of the parking lot, of the automobile driven by the deceased, of the door leading to the parking lot, of the wrought iron in the alley, and in other places. The photographs also showed the defendant's car on the parking lot with the deceased's car. The defendant contends that one of the errors in passing the 1977 Supplement is that the photograph clearly shows the license number (ZUM-738).

For a photograph to be used to illustrate the testimony of a witness it must be identified as portraying the scene with sufficient accuracy but need not have been made by the witness himself provided he can testify as to the accuracy as a representation. 2 Stansbury's, supra, § 34, pp. 95-96. Stansbury also points out that "[p]hotographs of the crime-connected scene of an occurrence are admissible when properly identified by a witness as being accurate representations of the conditions as he saw them at the time in issue." 2 Stansbury's, supra, § 34, p. 97; State v. Watson, 310 N.C. 390, 312 S.E. 2d 471 (1984); State v. Hawkins, 294 N.C. 539, 242 S.E. 2d 748 (1978).

At the time the photographs were introduced into evidence [illegible] the trial court instructed the jury that the photographs were introduced "for the sole purpose of illustrating or explaining the testimony of the witness. These photographs . . . are not to be considered by you for any other purpose." In addition, the [illegible] charge would have described to the jury as found on page [illegible] limited to illustrating the testimony of the witness as to the type, style, color [illegible] of the

vehicles involved and their relative positions and the relative positions of the various witnesses in the parking lot. There could be no misunderstanding that the photographs were posed or staged.

Certain exhibits of the County Police Department bearing on the license number (YUM-333) of the 1967 Chevrolet which defendant had been driving prior to the alleged crime, and which had been legally impounded by the officers. The jury was informed that the photographs were made by a professional photographer after the alleged kidnapping and that they were offered for the limited purpose of illustrating the testimony of the witness. "Photographs are admissible in this State to illustrate the testimony of a witness, and their admission for that purpose under proper limiting instructions is not error." State v. Cranton, 267 N.C. 42, 393 S.E. 2d 32 (1974). State v. Duncan, 263 N.C. 412, 139 S.E. 2d 65 (1972); State v. Cushall, 270 N.C. 331, 156 S.E. 2d 745 (1971). See generally, 1 Stansbury's, supra, § 34.

We hold that for the limited purpose of illustrating the testimony of witnesses, the posed or staged photographs were properly admitted into evidence. This assignment is overruled.

By his assignment of Error No. 12, defendant alleges that the trial court erred in allowing witnesses to make in-court identifications of the defendant when those identifications were tainted by the police having shown those witnesses police photographs of the defendant which impermissibly suggested to the witnesses that the defendant was in fact guilty of the crimes for which he was charged.

Defendant contends that each of the witnesses who identified the defendant in open court had previously been shown a group of police photographs or mug shots and that those photographs showed a frontal view, right profile and left profile of each of the persons photographed. Defendant particularly contends that the witness Cline had less than one minute to observe the side of the

defendant's face, that he had never seen the defendant prior to 11 August 1973, and that his in-court identification was inadmissible.

In Simmons v. United States, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968), the court held that "each case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . ."

In each instance when the identification of defendant by a witness was questioned, the trial court held an extensive voir dire hearing. After two of these hearings, the court held that the testimony of the witness in question regarding the identification of defendant was not admissible. In the others, he held the identification testimony admissible. In each instance he found facts and made conclusions of law. Defendant strenuously objected to the identification of defendant and the deceased by the witness Cline. We quote some of the findings of fact made by the trial court and his conclusions of law as to this witness.

"FINDINGS OF FACT

* * *

"That it was daylight. That there was nothing obstructing the vision of the witness, Cline, of either of these parties and that he observed the. [illegible] portion of the front of the faces of the individuals when he described.

* * *

"That he was within twenty to thirty feet of the [illegible] that he did not have to fix the [illegible] a lamp in which [illegible] was placed or elsewhere the individuals in addition.

* * *

"That the witness had a fair opportunity to observe the [illegible] and a portion of the front of the faces of

both parties present on the parking lot on the morning of August 11, 1973, and observed them from the time he emerged from the alley, crossed the street and turned to the jewelry store.

"That the identity [sic] by the witness, Cline, of the defendant and Paula Gail Hollar was based upon his observation of these two persons at the time he saw them in the parking lot near the jewelry store and the independent recollection of what he saw on that occasion and not the photographs of the defendants which were displayed to him by the officers at the police station or upon the photograph of Paula Gail Hollar which he now has, on the desk at the time or at some later time.

"That the witness's identification of the defendant and Paula Gail Hollar was of independent origin and did not originate in the police station of the town of Lenoir.

"CONCLUSIONS OF LAW

"Based upon the foregoing findings of fact, the court concludes as a matter of law that the pre-trial identification procedure of displaying the photograph was not unconstitutionally suggestive and conducive to irreparable mistaken identification and the court finds the evidence totally void of anything to suggest that the procedures as followed would profoundly offend fundamental standards of decency, fairness and justice and amount to denial of due process of law. Next, that there is no substantial likelihood of irreparable misidentification.

"Based upon the foregoing findings of fact and conclusions of law it is the order of the court that this witness be permitted, in open court, to identify this defendant."

In State v. Huggle, 281 N.C. 515, 521, 221 S.E. 2d 334, 337 (1976), Chief Justice Bobbitt stated the rules governing voir dire hearings when identification testimony is challenged:

"When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the circumstances relevant to determine whether the pre-trial confrontation meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appeal even though [illegible] 277 N.C. 412, 417, 177 [illegible] 210 (1970); [illegible] 278 N.C. 681, [illegible] 180 S.E. 2d 823, 827 (1971); [illegible] 279 N.C. 477, 481, 183 S.E. 2d 624, 627 [illegible]."

[illegible], State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974); State v. [illegible], 285 N.C. 220, 204 S.E. 2d 808 (1974). See, 1 Stansbury's, [illegible], § 27, pp. 175-77.

In the present case the ruling given by the trial court after voir dire hearings concerning each witness allowed to identify defendant were substantially as set out above for the witness Gaines, were supported by competent evidence and are conclusive on this Court.

This assignment is overruled.

Defendant next assigns as error the admission of testimony of a witness who was unable to identify with certainty an automobile or its occupants.

The witness Wilcox testified that she saw a light-green Chevrolet with two passengers turn onto Old Mill Church Road at approximately 10:00 a.m. on Saturday, 11 August 1973. She testified that she thought the car was a light-green 1967 Chevrolet although she was uncertain of the color of the top. She thought the driver was a male but was unsure about the passengers. She noticed nothing unusual about the way the passengers were seated.

Defendant contends that this testimony was highly prejudicial to defendant for it tends to put the light-green car that defendant had been driving near the location where the body of [illegible] was found without any evidence as to who was driving the car at the time.

Chief Justice Denny, in State v. Hamilton, 204 N.C. 277, 280-87, 168 S.E. 2d 385, 512 (1969), a case in which he held the State failed on circumstantial evidence, stated: ". . . However, in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." Accord, State v. Arnold, 284 N.C. 42, 199 S.E. 2d 431 (1973); State v. Cline, 284 N.C. 350, 200 S.E. 2d 613 (1973); State v. Hamilton, 277 N.C. 480, 164 S.E. 2d 289 (1968).

The testimony of the witness Wilcox was relevant in that it placed a male driver in a light-green automobile approximately the same time and on the wrong side of the road as Whitaker before turning into Old Mill Church Road at approximately 10:00 a.m. on the

morning of 11 August 1973. This was after the body of [illegible] was found the next day.

This is a circumstance to be considered by the jury. The weight is for the jury. This assignment is overruled.

Defendant next argues he was denied the failure of the trial court to charge on defendant's evidence relating to alibi.

Defendant's sister, Barbara Hinton, testified that defendant was at her house on 11 August 1973 from 7:00 a.m. to 7:40 a.m. and later that same morning stayed from 10:00 a.m. until 10:15 a.m.

Louise Wilson testified for the State that she saw two people drive onto Old Mill Creek Road at about 10:20 a.m. that same morning.

This is the only evidence cited by defendant of an alibi.

Although it is doubtful if this evidence is sufficient to require the court to charge on alibi even if requested to do so, no such request was made in this case.

In State v. Hunt, 279 N.C. 617, 197 S.E. 2d 513 (1973), we established the rule in this jurisdiction that the court is not required to give an instruction on alibi unless requested to do so by the defendant.

In State v. Shaw, 285 N.C. 320, 341, 204 S.E. 2d 802, 816 (1974), Justice Huskins, speaking for the Court, said:

> "Prior to decision of this Court in State v. Hunt, 279 N.C. 617, 197 S.E. 2d 513 (filed 12 July 1971), a defendant who offered alibi evidence was entitled to such instruction without specifically requesting it. State v. Hines, 277 N.C. 249, 177 S.E. 2d 393 (1970); State v. [illegible], 253 N.C. 813, 118 S.E. 2d 137 (1961); State v. [illegible], 250 N.C. 722, 110 S.E. 2d 290 (1959); State v. [illegible], 250 N.C. 407, 121 S.E. 2d 173 (1961).
>
> "In State v. Hunt, supra, we held that upon a proper request for it, the trial court must give an instruction on alibi, namely, that the defendant is not guilty if he was elsewhere when the crime was committed. Thus, the alibi instruction, if sought at the proper time, is mandatory. The rule stated herein will be applicable to trials commenced after the filing of this opinion. . . .' The opinion in [illegible] was filed 12 July 1974. . . ."

The trial of the present case began on 21 January 1974.

In the absence of a request for instruction on the evidence of

no error, no such instruction was requested. This contention is untenable.

By his assignment of error No. 20, defendant contends the trial court erred in failing to submit to the jury the question of defendant's guilt of second degree murder as a lesser included offense under the first degree murder indictment.

On 11 August 1970, G.S. 14-17 in part provided:

> "Murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the commission of or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . ."

The trial judge, after defining "malice aforethought" and "malice," charged the jury:

> "So, I instruct you, members of the jury, that if you find from the evidence and beyond a reasonable doubt that on or about the 22nd day of August, 1970, Wilbur Wright acted [with] malice in the killing with a lethal instrument . . . which proximately caused the death of Elvira Wright . . . unlawfully, and you further find from the evidence and beyond a reasonable doubt that Wilbur Wright, he would be guilty of murder in the first degree. However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of guilty of murder in the second degree."

The judge did not instruct regarding proof of malice in the first degree killing with premeditation and deliberation or regarding [illegible] murder.

[illegible] to show that the accused killed [illegible] premeditation and deliberation, of a [illegible] in the perpetration of [illegible] robbery, [illegible] State v. Wilson, 268 N.C. 187, 150 S.E.2d 63 (1966); State v. [illegible], 262 N.C. 672 (1964); State v. [illegible], 261 N.C. 314 (1964); State v. [illegible], 258 N.C. 174 (1962); State v. [illegible], 258 N.C. 676 (1963). In the present case, the [illegible]

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(consisting of over 300 pages in the record) tended to show that Paula Gail Hollar was kidnapped by defendant on the streets of Roxobel, forced into his automobile, driven to a secluded area off Hilliston Drive, raped, and murdered. Defendant's evidence sought to show that Mrs. Hollar had not been raped, that she had not been kidnapped, and that in any event defendant was not the perpetrator of the crimes. The jury was instructed that if they believed deceased was killed but did not believe that this occurred during the perpetration of rape or kidnapping by defendant, they were to return a verdict of "not guilty." We find no evidence in the 21-page record of this case that suggests deceased was killed either in the perpetration or attempted perpetration of the felonies of kidnapping and rape. We hold therefore that the trial judge did not err in failing to instruct the jury on the question of defendant's guilt of the lesser included offense of second degree murder.

By assignments of error Nos. 18 and 19, defendant contends the trial court erred in overruling his motions for directed verdicts of not guilty and motion to set aside the verdicts.

[illegible] motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury. State v. Miller, 205 N.C. 131, 90 S.E. 2d 913 (1955); State v. Randolph, 195 N.C. 114, 141 S.E. 2d 294 (1928). "When the evidence is sufficient to overrule defendant's motions for nonsuit, the evidence is also sufficient to overrule defendant's motion for a directed verdict of not guilty, since the motions have the same legal effect." 2 Strong's N.C. Index 2d, Criminal Law § 103 (1971 Supp.); State v. [illegible], 281 N.C. 315, 188 S.E. 2d 293 (1972). On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment to be drawn [illegible]. [illegible], 2 Strong's N.C. Index 2d, Criminal Law § 106 (1967), but inconsistencies should be disregarded. Contradictions

and discrepancies are for the jury to resolve, and do not warrant nonsuit. Id. Only the evidence favorable to the State will be considered, and defendant's evidence relating to matters of defense will not be considered. Id.

The State's case is based upon circumstantial evidence. The State offered numerous witnesses whose testimony tended to show that defendant was in downtown Lenoir around 9:00 a.m. on 11 August 1973 driving a 1967 light-green Chevrolet with a dark top. Several women testified that they were approached by defendant on this morning. There was testimony that a man and woman were seen scuffling in the parking lot where deceased's car was parked and that deceased was shoved into defendant's car. A car like defendant's carrying two occupants and with a male driver was seen about an hour and twenty minutes later on the wrong side of Hibriten Drive and the car turned into Old Hill Creek Road. The victim's body was found in a stream nearby late the next day. The victim had live spermatozoa in her vagina, her vagina and rectal area had been injured and there was a tear in the peritoneum. Rings identified as belonging to the victim were given by the defendant to his wife on the afternoon of 11 August. A torn portion of an insurance identification card was found in the 1967 Chevrolet operated by defendant, and this torn portion matched the other portion of the card found with the personal effects of the deceased. Fibers found in the 1967 Chevrolet matched fibers from the dress worn by the deceased on August 11.

The State's evidence in this case was clearly adequate to [illegible] defendant's motion for directed verdict and the case was properly submitted to the jury. This assignment is overruled.

Defendant next contends that the trial court erred in [illegible] to instruct the jury [illegible] in the kid-napping [illegible].

The trial judge instructed the jury that in order to find defendant guilty, they must find that [illegible] caused the death,

of deceased while committing or attempting to commit the crimes of rape or kidnapping. It is clear from this instruction that proof of rape or kidnapping was an indispensable element in the State's proof of murder in the first degree. This being true, neither rape nor kidnapping affords basis for additional punishment under the merger rule, most recently discussed in State v. McLaughlin, 286 N.C. ____, ____ S.E. 2d ____ (1975). See also, State v. Moore, 284 N.C. 485, 202 S.E. 2d 169 (1974); State v. Carroll, 282 N.C. 326, 193 S.E. 2d 85 (1972); State v. Peele, 281 N.C. 253, 188 S.E. 2d 326 (1972); State v. Thompson, 280 N.C. 202, 185 S.E. 2d 666 (1972). This assignment is sustained and the judgments in the kidnapping and rape cases are arrested.

By Assignment of Error No. 9, defendant contends it was prejudicial error to allow Laura Ward, an expert in forensic serology employed by the State Bureau of Investigation Chemical Laboratory, to testify as to the presence of human blood on the seat cover of the 1967 Chevrolet automobile allegedly driven by defendant on 11 August 1973.

At trial, Laura Ward testified that her examination of the seat cover revealed a bloodstain approximately two inches in [illegible]. The quantity was sufficient to allow her to determine the blood to be of human origin, but insufficient to allow her to determine the blood type. She further testified that the blood was diluted by some substance, but could not determine what that substance was. She could not tell how long the blood had been on the seat cover—whether one or two [illegible]. Defendant moved to strike this testimony as being of no probative value, which motion was denied by the trial court.

In 1 Stansbury's, Evidence, § 77, we find:

"[illegible] standard of admissibility, [illegible] relevancy is of [illegible] [illegible] . . . [illegible] to be proved by it. . . ."

this Court has held that ". . . in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible." State v. Hamilton, supra. Accord, State v. Arnold, supra; State v. Shaw, supra.

Prior to the testimony of Laura Ward, the State offered evidence tending to show that deceased had been forced into an automobile like that driven by defendant on 11 August, and that the deceased suffered wounds and bruises to various parts of her anatomy before her death. The State also introduced evidence tending to show that a portion of deceased's foreign identification card was found in the 1967 Chevrolet belonging to defendant. Subsequent to the testimony of Laura Ward, the State offered evidence tending to show that fibers from the seat cover of the 1967 Chevrolet matched fibers from the clothing worn by deceased on the day of her death.

To be admissible, an item of evidence need only have a logical tendency to prove a fact in issue, and need not prove a material fact <u>of itself</u>. As is said in McCormick on Evidence 439 (2d ed. 1972):

> ". . . Even if the relationship between the item and the matter to be proved is not strong enough to warrant the judge in affirmatively finding that the proponent has sustained the burden of showing the existence of the fact essential to the item's admissibility, or even if the judge is convinced that the proponent will not succeed in establishing the fact, the item may still be admissible. The judge may properly recognize that the jury might reasonably find the existence of the fact and that the item has probative value in establishing it. Thus the judge may admit the item upon condition that proof of the fact be supplied later in the trial. If it is not supplied, the judge can then instruct the jury to disregard the item. Of course, if the judge believes that no reasonable juror could find the fact, he should exclude the item. The probative connection between evidence and a fact to be inferred from it is commonly said to depend upon or involve a generalization, an experience-based principle or rule of thumb by which the trier of fact is justified in making the desired inference. Sometimes this principle or rule is clear and certain, being founded upon unquestioned scientific theory or accepted common experience. Sometimes it is not certain, resting upon mere conjecture or upon a disputed or questionable theory. Sometimes the relevancy of the item depends upon the existence of another fact, which may itself be in dispute and require evidence. Sometimes the item is relevant only as part of a larger display of evidence, no single piece of which is sufficient by itself to make proponent's case. In all these situations, the judge cannot exclude the item because connection between it and the fact sought to be proved does not clearly appear. He may admit the item upon, or subject to, the introduction of evidence sufficient to support a finding of the fact, and may exclude the item if this evidence is not forthcoming. In such cases the relevancy of the item depends upon the existence of the fact, and the jury cannot properly consider the item unless they find that the fact exists. How much evidence will be required is to be determined by the trial judge in each case. Probably in most cases the item would not be admitted unless there was evidence from which the jury could reasonably find the existence of the fact, but the judge may admit the item upon slighter evidence, though of course the final decision will be for the jury. The judge may exclude the item if he thinks the evidence of fact is not sufficient to support a finding, or he may admit the item upon the condition that evidence sufficient to support a finding of the fact is introduced later. Which he will do is a matter for the judge's discretion in each case." (Emphasis added.)

See also, 2 Stansbury's, supra, § 72, p. 211.

When considered with other circumstances shown by the evidence, to which the fact that there was a human bloodstain on the front cover of the automobile allegedly used in

the kidnaping of deceased and driven by defendant on the morning of 12 August 1975 is highly probative of a material fact in this case and was properly admitted in evidence. The fact that the jurors could now show the blood type went to the weight of the evidence and not to its admissibility. This assignment is overruled.

Defendant next contends that the court erred when it allowed witness W. R. Pearce to testify regarding matters within his common experience and not based on expert tests conducted by him.

Mr. Pearce, a forensic chemist for the State Bureau of Investigation Chemical Laboratory, testified at length concerning his examination of fibers from the victim's dress, his examination of fibers seized in the search of the 1967 Chevrolet, and his expert opinion as to similarity of the fibers. Mr. Pearce used microscopic examination, solvent tests and thin-layer chromatography in reaching the conclusion that the fibers found in the automobile could have come from the victim's dress. He testified that it was "unlikely" that these fibers came from a different article dyed in the same manner as the dress.

On cross-examination, Pearce testified that he had some limited impressions as to how common the various fibers were. He said the cotton fiber was fairly common but that the red polyester fiber was "quite unique when found" and "reasonably rare" due to the fact that it was dyed by a mixture of several different dyes rather than by one of the approximately thirty dyes most commonly used. He stated that it was therefore "unlikely" that these fibers came from a source other than the victim's dress. He concluded that he did not know exactly what quantity polyester fiber was dyed with the same mixture of dyes or how much of this fiber was distributed in the Kenzie area, and that he therefore could not assign any probability to the fact the fibers found in the automobile were from a source other than the victim's dress, but that the word "unlikely" meant to him ". . . just going through

life . . . you don't routinely see two women with the same dress on. It does happen, but it is not unusually common. Now . . . you go in a clothing store and . . . see duplications, but they are not the rule."

It is the rule in North Carolina that "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion." 1 Stansbury's, supra, § 133. State v. Johnson, 280 N.C. 201, 185 S.E. 2d 666 (1971); State v. Vestal, 278 N.C. 561, 180 S.E. 2d 755 (1971); Hunt v. Weston, 255 N.C. 42, 76 S.E. 2d 326 (1953). In this case, the trial judge found Mr. Pearce to be an expert and there is ample evidence to support this finding. It is clear that the witness's statements to the effect that the red polyester fibers were "reasonably rare" and that it was "unlikely" that the fibers came from a source other than the dress of the victim were based on his expertise. He exhibited a professional familiarity with dyes and dyeing techniques, and knew which dyes were more common than others. We think the fairest statement by the witness on cross-examination that it was also unlikely that two women might own the same dress was immaterial in this setting. Clothing merchandising was not this expert's area of expertise, as the witness pointed out when he said his answer was based on "just going through life." Defendant, having asked the questions, cannot now be heard to say the court erred in allowing seemingly innocuous answers. This assignment is overruled.

Defendant next assigns as error the trial court's denial of his motion to quash the bills of indictment for the reason that the felony murder statute under which he was elected to proceed is unconstitutionally vague in that it was not limited in [illegible] to those of the felonies on one of the felonies that would [illegible] under the misdemeanor rule.

Suffice to say that, prior to the amending of G.S. 14-17 to add kidnapping to the list of specified felonies (1973 Session Laws, Chapter 1201, Section 1, effective 8 April 1974), it was well established that any felony inherently dangerous to life is within the purview of G.S. 14-17 though not specified therein. State v. Thompson, 280 N.C. 202, 185 S.E. 2d 666 (1972); State v. Rich, 277 N.C. 333, 177 S.E. 2d 422 (1970); State v. Streeton, 231 N.C. 301, 56 S.E. 2d 649 (1949). We held in State v. Streeton, supra, that a homicide in the perpetration of kidnapping is first degree murder, Justice Ervin stating that "[w]hen a person undertakes by force or violence to kidnap another . . . contrary to G.S. 14-39, he commits or attempts to commit a felony which has a natural tendency to cause death."

Rape was listed in G.S. 14-17 at the time of the alleged murder as one of the felonies that would support a conviction under the felony-murder rule. Either kidnapping or rape would support a conviction under this rule.

There is no merit to this assignment.

Defendant finally contends that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated in this case by the imposition of the mandatory death sentence. Defendant contends specifically that due to the large amount of discretion present in the administration of criminal justice, particularly the discretion vested in the district attorney in determining which cases will be prosecuted for the capital crime or which should be prosecuted for a lesser offense, the imposition of the death penalty is cruel and unusual punishment and operates to deprive him of his rights of equal protection of the law. Both of these contentions were exhaustively argued, carefully considered and rejected in State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our decision in that case. [illegible], State v. [illegible], [illegible] N.C. 50, [illegible] S.E. 2d [illegible] (197[illegible]); State v. [illegible], [illegible] N.C. [illegible], [illegible] S.E. 2d [illegible] (197[illegible]); State v. [illegible], 285 N.C. [illegible],

[illegible] 70 SD (2d) [illegible] and N.S. 412, 224 P.2d [illegible] (2d) [illegible].

[illegible] of the Legislature of the State of California, it has [illegible] expressed the policy of this state that each litigant [illegible] bring his lawsuit by [illegible] the consideration of this [illegible] possible a jury which does not [illegible] views.

As to the motion for change of venue.

As to the kidnaping and rape charges. Defendant argues [illegible].

State v. Woods - No. 10

Chief Justice Sharp dissents as to the death sentence and votes to remand for the imposition of life imprisonment for the reasons stated in her dissenting opinion in State v. Waddell, [illegible] N. C. _____, ____ S. E.2d _____ (1973).

No. 13 - State v Hoss

Circuit
Opinion

Correct. Justice Clayton as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v Williams, 305 N.C. 422 at 437, _____ S.E.2d _____ (1975).

[illegible]

[illegible]

[illegible]
CLERK SUPERIOR COURT
OF NORTH CAROLINA

[illegible] - State v. [illegible]

[illegible] Defendant's motion for [illegible] and [illegible]
[illegible] which motion has been scheduled for hearing on the [illegible]
[illegible] of the above case at [illegible] and it appearing that the [illegible]
[illegible] will be called as a witness in this hearing, it is hereby ORDERED that
[illegible] be, and he is, _____ from the _____ County, North Carolina
[illegible] to the above cause on December 8 at the [illegible]
[illegible] hearing.